



SCHOOL OF HUMANITIES

COPYRIGHT ASPECTS OF LINKING AND FRAMING

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Dedication

To my mother who has always been an inspiration to me

“The intellectual property is always in progress and even rapidly. The task of the legal, regulatory, performer or applicator is to be situated in tune with these rhythms or at least trying”¹

¹Γεώργιος Κουμάντος, Πρόλογος σε “Κοινωνία των Πληροφοριών και Πνευματική ιδιοκτησία”, επιμέλεια Μ.-Θ. Μαρίνος, 2003, σελ.10 και επ.

ABSTRACT

The evolution of Internet has forever changed the legal landscape. Internet is the world's largest marketplace, copy machine, and instrumentality for committing crimes, torts, and infringing intellectual property. In less than twenty - five years, Internet law has created new legal dilemmas and challenges in accommodating new information technologies. Chapter I of this paper clarifies the complexity of conceptual definitions that are involved in linking and framing methods. Chapter II specifically examines copyright that may be implicated by transmissions and use of works on the Internet by the above mentioned activities, in the light of case law or disputes that have grappled with these technologies. Chapter III suggests some possible solutions and draws some conclusions about one of the booming topics not only for copyright law but also for cyberspace law in general.

TABLE OF CONTENTS

Abstract	iii
Preface	6
CHAPTER I: CATEGORIES OF LINKS	8
Introduction	8
1. Linking	10
1.1. Definitions and Categories	10
1.1.1. Hypertext Reference Links (HREF)	10
1.1.1.1. Special features of the HREF	11
1.1.2. IMG link	12
2. Framing	12
3. Special features of frames	13
3. Implications of Linking	14
CHAPTER II: COPYRIGHT ISSUES REGARDING LINKING PRACTICES IN THE LIGHT OF CASE LAW AND THE INFORMATION SOCIETY DIRECTIVE	17
1. General copyright issues	17
1.1. Liability for framing online content	19
2. Directive 2001/29/EC for Copyright and Related Rights in the Information Society	20
2.1. General goals of the Directive	20
2.2. The right of “making available to the public” in relation to hyperlinks and frames	20
2.2.1. The notion of “public”	23
2.2.2. The three-step-test	24
2.2.3. The notion of “On demand”	25
2.3. Adaptation of copyright to the digital environment	25
2.4. Relevant Case Law	27
2.5. Contributory Infringement for the link provider	30

2.6. Conclusive note on the Information Society Directive	30
CHAPTER III: FUTURE OF LINKS IN COPYRIGHT LAW	32
1. Technological measures to prevent linking	32
1.1. Common Disclaimer	32
1.2. No Linking or Framing or Requirement Statement	32
1.3. Link Removal Request Policy	33
1.4. Identify Sites Framed	33
1.5. Obtain Licenses or Agreements to Link, Use Trademarks or Copyrighted Material	33
1.6. Block Requests from other than Specified URLs	34
1.8. Track Which Web Sites are Linking to the Web Site	34
1.9. Dynamic URLs	34
1.10. Software to Prevent Copying of Images	35
Conclusions	36
BIBLIOGRAPHY	37

PREFACE

The World Wide Web -or simply the Web-, the best known application of the Internet, boomed after Tim Berners-Lee, a software expert, invented in 1989² an easy, user-friendly and dynamic way of connecting documents. These so-called links were conceived in order to enable researchers to reach documents in complex networks more easily and efficiently. Linking is a powerful tool used in the Net, and for this very reason it has been very successful among users. Links have made the Web a channel for free distribution of information.³ During its early its sole purpose was to facilitate the exchange of information between researchers and educators.

During recent years, Internet has become the basic foundational infrastructure for the global movement of data of all kinds. Internet is now a major global data pipeline used for the transmission of intellectual property content. Given that it is utilized more and more in everyday commerce to sell and deliver creative content and information across transnational borders, matters of intellectual property protection pertaining to the material available on and through the Internet are gaining in importance.

Copyright law provides one of the most important forms of intellectual property protection on the Internet given that it applies to works of authorship, such as multimedia works, multimedia works, audiovisual works, movies, software, database information and the like, which are within the usual subject matter of copyright. Copyright law also applies in the basis that electronically moving data implies, above all, that it is “copied” as transmitted through networks.

Traditional copyright law was designed to deal primarily with the creation, distribution and sale of protected works in tangible copies. In a world of tangible distribution, it is generally easy to know when a “copy” has been made. The nature of the Internet,

²Berners-Lee “invented” the World Wide Web at CERN (the European Particle Physics Laboratory), see O'Rourke, M. (1998), *Fencing Cyberspace: Drawing Borders in a Virtual World*, *Minnesota Law Review*, 82, p.631

³Berners-Lee, Tim, (1999), *Weaving the Web: The original design and ultimate destiny of the world wide Web by its inventor* 3. Berners-Lee traces his interest back to a conversation with his father, a mathematician, when his father sought ways “to make a computer intuitive, able to complete connections as the brain did”.

however, is such that it is often difficult to know precisely whether a “copy” of a work has been made and, if so, where it is located within the network at any given time.

Nowadays, a good number of cases poses challenges; this is due to the fact that linking is permitted in the Web without any limitation or restriction. As a result many commentators have started to discuss not only when, but also whether linking should be permitted at all where commercial interests are involved⁴. Linking raises concerns both in the fields of trademark and copyright. However, this paper will not address the trademark issues; it will focus entirely on copyright law⁵.

4 See Jackson, M. , (1997), Linking Copyright to Home Pages 49 *Federal Communications Law Journal*, at 733.

5 For a discussion on the trademark issues raised by linking in the world wide Web, see Sableman, Mark, (2001), *Link Law Revisited: Internet Linking Law at Five Years*, Partner, Thomson Coburn, LLP, St. Louis, Missouri.

CHAPTER I

CATEGORIES OF LINKS

INTRODUCTION

The culture of Internet stems from its roots, in which its primary purpose was to share information and entertainment. Users, typically and technically, shared a sense of companionship, wanting to share their sites and information therein with others. Only recently has the Internet become popular for commercial transactions, inviting less technical users and greater concern with regards to protecting proprietary information.

The Web is structured as a vast collection of interconnected digital documents, called Web pages. Each has a unique address, known as a Uniform Resource Locator (URL), which functions much like a phone number.

Often, however, it is unnecessary to type, or even to know, these URLs. Direct links from one Web page to another -called *hypertext links or hyperlinks*- make it simple to navigate through huge collections of documents. These links are a central Web feature, and enable users to "surf" or "browse" without having to memorize long lists of addresses.

Links or Hyperlinks are an essential part of the Internet, providing the high degree of interconnection that makes the World Wide Web a genuine Web despite its enormous size.

Recent studies in information science have revealed that hyperlinks found on a Web page are more indicative of the nature and character of the Webpage than its actual text.⁶

Hyperlinks also differ from print citations in that they are much more likely to be followed⁷ since they are an easy way to access on the spot, there and then information. Footnotes and endnotes tell the reader where he can find an item by expending time and effort, but hyperlinks provide instantaneous and seamless access to the cited information.

⁶See Vreeland, Robert C., (2000), *Law Libraries in Hyperspace: A Citation Analysis of World Wide Web Sites*, a revised version of a winning entry in the new members division of the 1999 AALL/Matthew

⁷ Users may even follow hypertext links too often, thereby losing their way and becoming disoriented.

There are basically three ways users can access new sites. These include access via a search engine that scans meta-tags,⁸ via hypertext links, and through sites that frame other sites' pages.

Between the history of the Internet in which site developers wanted users to see their sites, and the funding sites can achieve through advertising, the prevalent culture of the Internet has traditionally been one of free linking. Web site owners did not require permission to link their site to another, traffic was generally considered good. It has become commonly accepted that if one publishes a site on the Internet, then others can link to it freely. As the culture of the Internet has historically been one in which site owners desired viewers, there has been common acceptance that there is no reason to obtain permission prior to linking to another site. Recently however, concerns have arisen regarding this commonly accepted practice on the Internet, sometimes termed as "netiquette".⁹ Problems also arise when site owners do not get recognition for their information or when other sites benefit by linking.

The majority of companies use the Web for marketing or commerce purposes, providing users with free access to their sites. Such sites are commercially focused and typically funded by advertising banners that site owners charge on a per-hit fee basis. Competition for advertising revenue drives the competition for site visits, or hits.

The ubiquitous hyperlink has become essential to the success of the Web as both an information resource and a financially profitable medium.¹⁰ Web site owners also use hyperlinks to increase traffic. For sites that hope to generate advertising revenues, the more visitors, the greater the potential payoff.

Nowadays, many commercial site owners pursue advertisers in order to make a profit. To these owners, Web site content is extremely valuable because it is the primary attraction for advertisers. Problems arise, however, when the technology that serves as a basis for the Web-hypertext linking causes users to bypass Web site advertising, thus

8 Google, the most famous machine in the crowded search engine market, has made a name for itself by implementing a search algorithm based on hyperlinks. Search engines allow the user to enter key words which the search engine then scans the Web for.

9 See www.wikipedia.org

10 Indeed, some of the most popular and successful Web sites, such as Yahoo, provide directories of links to Web pages organized by topic.

reducing advertising exposure and the amount of money the site can charge for advertising.

While this vast network blurs the lines between shared information and protected information, the corresponding legal issues expand. Although the use of hyperlinks themselves does not seem to raise any legal liability issues, nevertheless combining these links with a still newer technology, called “framing” may.

1. Linking

1.1. Definitions and Categories

The Internet, a vast network of computers, makes it possible to access content (i.e. text, graphics, audio, video, etc.) stored in the files of remote computers. A link is simply a connection between the content of two different files (or between different parts of a single file).

There are basically two big categories of links: *in links (or inline links)* and *out links (or outline links)*. The former lead to another file in the same Web site while the latter link to a file on a different Website. Internet browsers automatically decode the instructions given by links and retrieve the specified file.

1.1.1. Hypertext Reference Links (HREF)

The HyperText Markup Language (HTML), used to program pages on the Web, allows two types of links.¹¹ The first, a hypertext reference (“HREF”) link or hypertext link instructs the browser to abort viewing the content of an individual location and initiate viewing the content of another. It may guide the viewer to a different point on the same page or to a different page in the same site or to a site other than the local Web site (out linking).¹²

¹¹Roarty, Allison, (1999), Link Liability: The Argument for Inline Links and Frames As Infringements of the Copyright Display Right, 68 Fordham L. Rev. 1011. Available at: <http://ir.lawnet.fordham.edu/flr/vol68/iss3/13>, at 1013.

¹² Ibid at 1017

Thus, when the user clicks on an out link, a connection is made to a new site or page and the new document replaces the current document on the user's screen. Out linking is the most common method of navigating the Web.¹³

Hypertext links include coding that informs the user's computer of the location of a designated site. The user can view the site by clicking with their mouse on the highlighted text or symbols, called icons, differentiated from regular text onscreen by a special color or formatting such as underlining, or picture indicating a hypertext link. Whenever a hypertext link is clicked upon, a connection to the new site is formed and the viewer is transferred to the new site with the new site's Universal Resource Locator (URL).

Hypertext links are the most fundamental hyperlinks. They serve much the same function as a footnote in an article: they direct a reader from one location to another on the Internet. Hypertext links allow the viewing of content from only one site at a time.

Deep linking occurs when the linking site creates a link to an underlying page (rather than to the home page thereof) of the linked-to site. It is a special kind of hyperlink that defeats the remote Website's intended method of navigation, taking one to an interior page of Website, deeper than the home page.¹⁴

1.1.1.1. Special features of the HREF

They come into play when selected by the user with the mouse or a few keystrokes. Usually, they are highlighted in blue or white, so they are easily identified as links and are distinguished from the other elements of a Web site. They do not create an "extra copy of the work" other than the one created in the RAM of the user's computer that enables him to browse the Web pages. The HREF link is a shortcut to avoid the typing of the URL, and in that sense it does not grant the exclusive right of reproduction of the copyright owner more than browsing a Web page does.

¹³This kind of process is also called "direct link", "site link", "hyperlink", or "hypertext link, see Garrote, Ignacio Javier, (2002), "Linking, Framing and Copyright: A Comparative Law Approach" Autonomia University of Madrid, Spain, at p.4, available at <http://papers.ssrn.com>

¹⁴Bodard, K., De Vuyst, B. & Meyer, G., (2004), Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions, *E-Law, Murdoch University Electronic Journal of Law* ISSN 1321-824, 11. Available at http://www.murdoch.edu.au/elaw/issues/v11n1/meyer111_text.html

The HREF links are simply references to other documents already available on the Web, and have no implied meaning in themselves. They can be considered the electronic equivalent of citations in the printed book world. A link can be established without the knowledge or consent of the owner of the linked site; no formal procedure is required and the normal, commercial browsers can easily perform it.¹⁵

1.1.2. IMG link

The other type of link is an inline link, called the embedded link -also known as IMG link or "auto load" link.¹⁶ This electronic process is automatically activated when the Web page is loaded and brings an image contained in a separate file into the text and onto the page that is viewed. This type of link is chosen by the Web author to connect to a graphic image, text, video or sound that is in fact part of another Web site, but appears on the screen as an embedded part of the first one. The separate file may be contained on the Web author's file server, on the same Web site, or on an entirely different site. The remote parts and image are visually incorporated into the linking page, while no copies are made or stored on the linking Web server.¹⁷

Unlike when accessing an HREF link, the user need not take any action to activate an IMG link; it is automatically activated upon loading the Web page because they are inherent in the HTML code. As a result, the image or text contained in the IMG link is brought into and displayed on the linking Web page as though it is part of that Web page.

2. Framing

Unlike linking, framing is a relatively recent phenomenon, introduced, as a means for linking Web sites, by Netscape in Version 2 of its Navigator product, which allows publishers of Web pages to divide a Web page into multiple separate windows that operate independently from each other. Framing allows a user or page designer to incorporate other site's pages into the screen while maintaining an advertising window and control of the user.

¹⁵See Garrote, Ignacio Javier, (2002), *supra* note 13

¹⁶ *Ibid.*

¹⁷Roarty, Allison, *supra* note 11 at 1018

Two or more Web sites may appear on the user's screen simultaneously. Frames thus enable a site to be broken up into component boxes. The contents of the boxes/frames can change independently of the contents of the other frames. They may contain text, graphics or other HTML elements such as hypertext, IMG links and other embedded frames.

Framing provides a useful navigation tool for users, since one frame can remain static while the user navigates through content within another frame. A user will only see the URL of the original site and not the site being framed. This may lead to confusion as to where the site is located.

The ability to create frames for advertising content has made them popular on commercial sites. Although the secondary site is viewed within the frame, the first site's URL is displayed on the user's browser.¹⁸ It is possible to obtain the URL of the framed site by looking in the dropdown View menu for Frame Info, but that is not intuitive to most users.¹⁹

Unlike HREF and IMG links, frames allow Web authors to incorporate entire Web sites produced by others, or portions of such sites; not only that but also to position their own advertising, logos or promotions next to them.

3.Special features of frames

When inlined images or frames are used, the risks that a viewer will be deceived about the source of goods are greater because the contents of the remote framed site are displayed under the URL of the first site while the connection to the old site is still not terminated. Furthermore, Web authors are allowed to choose which elements of the remote site will be included in their own pages and typically cause the obstruction of the advertising content of the framed site. No other choice is given to the user to surpass them since frames are automatically activated when a Web site is accessed and cannot easily be distinguished from other content within the site.

¹⁸Usually, when the user bookmarks a page, she is bookmarking the URL. In the case of frames, the URL remains that of the framing site. In version 3 of Netscape, the user may bookmark an individual frame by using the right mouse button and choosing "Add Bookmark" from the menu.

¹⁹ See Roarty, Allison, (1999), *supra* note 11 at 1011.

Thus, it is possible for images to be inlined into a document and combined with logos, trademarks or text that falsely describe their ownership without a viewer ever becoming aware that the image is derived from an external source. Indeed, frames are displayed and juxtaposed with text as well as images drawn from remote sites with other materials in a manner that may mislead the viewer as to the sources of the framed content.

All the above linking methods do not increase the value of the linked site's content; quite the contrary. Hence, copyright law applies: by compensating authors it encourages the dissemination of quality works and protects Web site owners from lost revenue due to decrease in value of the site content.

3. Implications of Linking

Linking is the sine qua non of the Internet's most popular information access tool, with millions of links placed throughout the Web. It enables the transfer and access to information that would have been unobtainable without spending valuable time and effort. Indeed, it allows for an in-depth analysis and research of the ad hoc topic; nevertheless it also raises traditional legal issues in the context of a novel and rapidly changing technology. With respect to the relatively straightforward hypertext link, the most obvious question is whether permission is needed to link to another site. In general, material published on the Web may be viewed by all Internet users unless affirmative steps are taken to limit access. Web pages are widely linked together without prior approval from content providers as a result of this free accessibility. The prevalent view of companies on the Internet is that publishing a site on the Web makes the site available for linking or that an implied license to link is consented when information is placed on-line on the Web.

Linking is only possible in a one-way direction, that is to say, from the site wanting to allow its users to move to another site. One may not place a link on another site to link back to their site without the site owner's permission. In most cases, linked-to sites typically do not object to linking because it benefits the linked-to site by bringing additional viewers and site hits: The more the links, the more the hits; the more the hits, the best promotion and dissemination of whatever information the Website owner intended to achieve. The prevalent view is that by linking to another Web site, the

primary Web site helps the secondary site by directing traffic to the site. Often, no permission is required to make a link to another site. This is the general consensus when a Website owner makes information available on the Internet: by the mere act of posting it, it is as if an implied licence to link to it was granted. Under another perspective it may be deemed as fair use.²⁰ Web site owners know that the Web is navigated through links and understand that by having a Web site, one assumes other sites will link to it.

Additionally, a simple link from one Website to the home page of another Website does not normally pose an issue: it is very similar to footnotes that refer to other sites. Employing a simple link, the user merely views the material from the linked site, and is aware that it originates from a different Website.²¹

Since most links do not (or cannot) conceal from the end-user the source from which information is being provided, there is little danger that the source of the content on a Web-page will be misrepresented.

The link is not considered as violating any rights insofar as the link is structured in a way that does not infringe or dilute a trademark or violate a copyright. The URL does not contain any expressive or original component that is protectable by copyright, but simply defines a specific location on the Internet where the related information can be found.

Web site publishers who link their materials to other sites must be cognizant of the intellectual property implications of their actions. For example, nicknames, slogans, titles and characters may be protectable under intellectual property law and including them in hypertext links, inlined images, or as part of a frame may result in infringement or misappropriation unless proper authorization is obtained.

The fact that Web site owners are willing to challenge owners of Web sites that are linking to or framing their Web sites places serious doubt on the Web community that unfettered use of hyperlinks and framing may violate intellectual property rights of others. These limitations seem particularly likely when associated with the linking or

20 See Garrote (2002), *supra* note 13 at p.184 and pp.187-188. See also Maureen A. O'Rourke (1998), Fencing Cyberspace: Drawing Borders in a Virtual World, 82, *Minnesota Law Review*, p. 609.

21 This process does not create a copy of the linked work, other than that created in the random access memory (RAM) of the computer.

framing of commercial sites which receive revenue from on-line advertising. Linking or framing to internal Web pages of these sites, raises a similar issue, because it prevents the owner from obtaining revenue from advertisers located on their home pages, that serve as virtual “front door”.

The Web community is highly concerned about the likelihood of a permission to be required for one Web site to be linked to another; this is because it strikes at the core operating feature of the Web and may drastically reduce the power of the Web.

If extreme restrictions are placed on linking and framing, the burden placed on Web site owners to obtain permission may outweigh the benefit of stopping a few undesirable links.

Linking agreements are common between the publishers of Web sites who have a common business interest. Such agreements are often used to maintain quality standards, performance criteria for the sites, site availability and other issues. The fact that the number of linking agreements is increasing does not necessarily indicate that firms believe linking requires permission, but that agreements can offer a complementary relationship between the sites. It may also be that these agreements are a response to legal uncertainty by risk adverse entities.

CHAPTER II

COPYRIGHT ISSUES REGARDING LINKING PRACTICES IN THE LIGHT OF CASE LAW AND THE INFORMATION SOCIETY DIRECTIVE

1. General copyright issues

Legal issues, or causes of action, associated with hypertext links and framing generally relate to concerns of intellectual property rights, creating unique jurisdictional disputes. As with most new technology, a vacuum is created in the law that remains until needed rules and regulations are established. Some existing law may be found to apply to this area and some case law exists, but it is still extremely rare. In some areas it is necessary that an entirely new approach is adopted for protecting Internet users, advertisers and site owners.

Absent a violation of rights in the way the link is structured (i.e. an infringing or diluting use of a trademark, copyright infringement, etc.) a link in itself is not viewed as violating any rights. Given the relevant infancy of international jurisdiction, a great deal of uncertainty exists with those who argue that embedding a link to a Web site is not different from listing a Web site, phone number, book title or address in a print publication and others who support that a contributory infringement is liable to occur in certain situations.²²

At first sight, from a copyright point of view, none of the rights of the copyright owner are involved when someone creates a link on his or her Web page to another document that already is made available by the rightholder on the Web. The link does not create a copy of the linked site, other than the RAM copy necessary to display every document on a computer screen, nor does it transmit the content of the linked site to the user's computer. In effect, the HREF link merely provides the browser with the Internet

22 De Wolf & Partners, (2013), Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, available at http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

address for a new page. Hence, it is unlikely that copyright liability would arise for presenting a hypertext link that merely recites a URL, because URLs, in and of themselves, are not copyrightable. Functionally, a URL serves the same purpose as a street address; it is used to define a unique location on the Internet where a piece of information may be located. As such, it contains no expressive or original component protectable by copyright. However, it should be noted that collections of URLs may be copyrightable and that their copying may result in a copyright infringement claim.

Many questions arise with respect to the content on the linked site with some linking practices becoming problematic. "Deep-linking", overpasses a site's home or front page by connecting a user directly to secondary material of another site, and may amount to an infringement of copyright in the secondary material. Similarly, an "embedded link", encompasses a reference to content from another Website such that the secondary material appears to be content originating from the first site. Such links do not require a copy to be made of the linked material, but may violate the author's right to display or communicate their work to the public.²³

The use of deep-links to retrieve material or data from the targeted site's database may, in some jurisdictions, amount to an infringement of rights in the database that contains the secondary information. In Europe, the E.U. Database Directive requires Member States to protect database owners from "repeated and systematic extraction and/or reutilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database".²⁴ This Directive has been invoked to prevent a news extractor's Website from deep-linking to articles on commercial newspapers' sites. In a case under Danish copyright law, the Denmark Bailiff's Court issued an injunction to prevent Newsbooster.com from providing services that enabled users, for a fee, to use key words to prompt Web "bots" (automated computer programs) to search news sites.²⁵ The defendants were prohibited from offering deep-linking search

23 For more information see Survey of the World Intellectual Property Organizations (WIPO) (December 2002) Intellectual Property on the Internet: A Survey of Issues, at p.52, available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/

24 Article 7(1) and (5). European Union Directive 96/9/EC of March 11, 1996, on the Legal Protection of Databases at <http://europa.eu.int/eur-lex/en/index.html>

25 In *Danish Newspaper Publishers' Association v. Newsbooster.com ApS*, Denmark Bailiff's Court, July

services, from reproducing and publishing headlines from the sites and from distributing e-newsletters with deep links.

1.1. Liability for framing online content

A related issue has arisen as a result of the practice of using browser software to "frame" content from another online source. The legal difficulty arises because the user sees the original Website content, which may be copyright protected, framed by a different Website, with a different URL, and possibly with different logos and advertising. This practice may constitute copyright infringement in some jurisdictions, because a copy of the material is made in the user's computer memory. In Germany, for example, framing is considered an infringement of the transformation right provided by Articles 62.1 and 39 of the German Copyright Act. In the case of *Roche Lexicon*, a Hamburg court decided that the RAM copies created in the process of framing constituted a reproduction of the work, that must be authorized by the rightholders.²⁶ It is clear that the law will continue to respond, through legislative and judicial developments, to questions raised by new practices of connecting information and users to material online. Because of the borderless operation of the Internet, it is preferable that these responses are compatible, and enable users and Website owners to exploit the Web of online information with confidence.²⁷

In many inline linking and framing cases, the copyright owner's market is affected because its advertising revenue may decrease when end users evade the copyright owner's advertising.²⁸

5, 2002. The Court found a violation of the Danish Copyright Act, §§ 71(1) and 71(2), enacted in June 1998 pursuant to the European Union's Database Directive. See Farhad Majoo, "Sites Barks About Deep Link," *Wired News* (May 1, 2002) at <http://www.wired.com>

26 See Garrote (2002), *supra* note 13, at p.31.

27 Ibid.

28 Another related activity that could result in liability for unfair competition is the use of links to falsely state or imply that a person or company has endorsed, sponsored or approved of goods or services of another company and would mislead consumers into believing that a product or service has been endorsed or approved when, in fact, it has not.

2.Directive 2001/29/EC for Copyright and Related Rights in the Information Society

2.1. General goals of the Directive

In the European Union, the question of linking is not specifically contemplated by any Directive. In consequence, the solution regarding the activation from the user of a link and the posting of frames has to be treated according to the general rules of the “communication to the public right” and its exceptions in the Common Position of Directive for Copyright and Related Rights in the Information Society, hereafter referred to as “Information Society Directive” or “InfoSoc Directive”.

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society entered into force on 22 June 2001.²⁹ Its purposes are mainly twofold a) to provide a harmonized legal framework on copyright in order to reflect technological developments, and b) to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996.³⁰

The principal goal pursued by the European legislature when adopting the Directive in 2001 was to foster growth and innovation of digital content services in the European Union: but in doing so to strike a delicate balance between the interests of authors, inventors or other rightholders in the control and exploitation of the fruit of their intellectual labour on the one hand, and society's competing interest in the free flow of ideas, information and commerce on the other.

2.2. The right of “making available to the public” in relation to hyperlinks and frames

Article 3 of the Information Society Directive transposes into EU law article 8 WCT and articles 10 and 14 WPPT. In fact it harmonises the right of ‘communication to the

29 Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society, OJ 2001 L167/10 (22 June) p. 10.

30 WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) both signed at the WIPO Diplomatic Conference, Geneva, 20 December 1996.

public’ and introduces the right of ‘making available to the public’. Following the Information Society Directive, the Member States are obliged to protect as an act of communication to the public: “the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them” (art. 3 InfoSoc Directive). This right was granted, as a part of the general right of communication to the public, for authors and, as a specific right, for performers, phonogram producers, producers of the first fixations of films and broadcasting organizations.³¹

Both rights (i.e. the communication right and the right of making available to the public) constitute exclusive rights.

The ‘right of communication to the public’ includes all non-tangible disseminations or transmissions of the work to the public by wire or wireless means and always in cases where the public is not present at the place where the transmission originates.

The directive does not provide a precise definition of the making available right; it is not clear which material acts are actually covered under this right and, importantly, which acts are not. This lack of definition entails the risk that this exclusive economic right is interpreted differently in the Member States. The Court of Justice has not had the occasion to provide a definition of the right of making available to the public.³²

The characteristic of this right is that works (or subject matter) are made available in such a way that members of the public may access them from a place and at a time individually chosen by them (*on demand*). It does not require a simultaneous addressing of the public or that the public is gathered in a particular place or that a pre-established program is provided.³³ It also applies regardless of the technology used to make the protected subject matter available to the public (internet technology, including

31The making available right is embedded in the Information Society Directive, in which other exclusive economic rights are provided as well, in particular the right of communication to the public and the distribution right.

32 The fact that the making available right in the Information Society Directive has its origin in the WIPO Internet Treaties entails that the WIPO documents can be used for the interpretation of this right at the European and national levels.

33The making available right should be distinguished by the broadcasting right, where the user selects the place and time to use the work, transmission and use are simultaneous. Also the program available is usually a pre-determined continuous program.

Webapplications or interactive television) or to access the protected materials (computers, television sets, “smart phones” or other portable devices).³⁴ Furthermore, it applies regardless of whether the subject matter has actually been consulted. It is the act of providing the work to the public that is crucial as well as the possibility for members of the public to access the work when and where at their own initiative (on demand).³⁵

It is irrelevant whether or how many times the work is actually accessed or the type of use intended (e.g. whether the work (or subject matter) is made available for viewing, listening or downloading). This right is relevant for the person (or entity) that makes the work accessible to the public and not for the member of the public that accesses the work. The act of the latter unless exempted by an exception or limitation, will probably be covered by the right of reproduction.

There is the view that ‘transmission’ itself is not covered by the ‘making available’ right, because access to the copyrighted material by the end-user may be permitted under the private use exception anchored in article 5(2)(b) of the Directive.³⁶

‘Making available to the public’ covers all on demand transmissions via computer networks (the Web in particular but other applications are covered as well, such as video on demand, pay per view TV, the selection of works (or subject matter) from online databases, films or songs) where one may retrieve a work with the aid of a search engine or special software and chooses the time and place to use it (rec. 25 InfoSoc Directive). If one cannot choose when and where to retrieve a work then it is not the right of ‘making available to the public’ that applies but rather the right of ‘communication to the public’. Such examples are broadcasting, simulcasting, Webcasting, streaming and near-video-on-demand (NVOD) services.

The transmissions are technically similar to private communications (e.g. telephone communications or e-mail correspondence). This right covers the fact that protected subject matter is offered to a public that is larger than the addressee of a “private” communication, even if it is followed by a one-to-one transmission.

34 De Wolf & Partners, (2013), supra note 22

35 Christophe, G. & Schönherr, F. (articles 5 and 6(4)), (in print), Stamatoudi, I. & Torremans, P. (eds.), *Copyright Law In The European Union A Commentary on EU Legal Instruments*, Edward Elgar Publishing

36 Ibid.

2.2.1. The notion of “public”

The starting point of the making available right is the availability (preceding the transmission on demand of the member of the public). It should however immediately be verified whether the public has access to the work. The mere storage on a server where the work could theoretically be accessed by a “public” does not seem to suffice: the distribution of the access key (hyperlink) that allows the public access to the stored content may in some cases trigger the qualification as an act of “making available”.

Although the public domain is nowhere specifically defined in the Directive or any other relevant EU legal instrument, the overall framework that it creates undeniably affects the way digital works are being used.

The fact that the making available right is categorised under the legal umbrella of the communication to the public right logically entails that the limitations to the right of communication to the public also apply to the making available right. Consequently, the making available right only covers hypotheses in which access to protected subject matter is given to a “public”, as interpreted by the Court of Justice.³⁷

Member States usually consider it as encompassing any circle of persons larger than the narrow circle of family and friends, or larger than the immediate social environment.³⁸ “Public” could also be defined as any use that cannot be considered “private”.³⁹ As long as the work is made accessible to people or a group of people who cannot be qualified as a “public”, there is no restricted act.

This requirement that a “public” should have access to the work, has proven decisive in the Court of first instance of Amsterdam, in *GeenStijl* case; ⁴⁰in it an act of

³⁷See CJEU 14 July 2005, Case C-192/04, *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*, Reports of Cases 2005 I-07199 (*Lagardère*), CJEU 7 December 2006, case nr. C-306/05, *SGAE v Rafael Hoteles*; CJEU 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)*, *Karen Murphy v Media Protection Services Ltd (C-429/08)* and *UsedSoft GmbH v. Oracle International Corp.* (Case C-128/11) (para 39).

³⁸ Stamatoudi, I. and Koumantos G., *Greek Copyright Law in P.E. Geller (ed.) International Copyright Law and Practice*, Matthew Bender, US, 2014, at 114.

³⁹ Even if one person is to receive a transmission, this is considered to be a transmission/communication to the public to the extent that these persons are not privately interconnected with each other.

⁴⁰Rb. Amsterdam 12 September 2012, *Sanoma Media, Playboy Enterprises International and X v GS*

communication to the public where an online news and gossip Website published the hyperlinks to a cloud service where nude pictures were stored that were previously not accessible to a public.⁴¹

2.2.2. The three-step-test

A key element in the InfoSoc directive is its article 5(5). All uses potentially covered by one of the exceptions and limitations listed in article 5 must, in addition, to comply with the so-called three-step-test inscribed in article 5(5) of the Directive.⁴² The Directive does not provide for a right to private copying. The private copying rules must be interpreted in the light of the three-step test under Article 9(2) of the Berne Convention, the TRIPS agreement, and the *acquis communautaire*.⁴³ Accordingly, the private copying exception shall only be applied in certain special cases and should be set aside if it conflicts with the normal exploitation of a work or other subject matter and if it unreasonably prejudices the legitimate interests of the rightholder. With the exception of Ireland and the UK, all Member States implemented the private use exception under Article 5(2)(b): still national provisions are very diverse.⁴⁴ The transposition of exceptions in the Member States is largely different, as the national lawmakers have implemented only the exceptions they deemed significant or adapted to their traditions. The conditions applicable to similar exceptions greatly vary from one country to another. Considering the currently fragmented harmonisation of copyright law, it could, therefore, be argued that the EU three-step-test should at least have to be read in the

Media (GeenStijl), accessible via www.iept.nl.

41 De Wolf & Partners, (2013), *supra* note 22

42 On the harmonisation of exceptions by the Information Society Directive, see GUIBAULT, L., WESTKAMP, G., IEBER-MOHN, T.R., HUGENHOLTZ, R.B., Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, report to the European Commission, DG Internal Market, February 2007, www.ivir.nl/files/implementation_2001_29_EC/index_eng.html at.36

43 See Christophe, G. & Schönherr, F. (articles 5 and 6(4)), (in print), Stamatoudi, I. & Torremans, P. (eds.), *supra* note 35

44 Commission Staff Working Document Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society) SEC (2007) 1556 at 4.

light of the corresponding provisions of WCT and TRIPs, both of which are mixed agreements.⁴⁵

2.2.3. The notion of “On demand”

The last element of the “making available” right is the way a work is accessed: Members of the public should be understood as not being present at the place where the act of making available originates (rec. 24 Information Society Directive) and are able to access the works from a place and at a time individually chosen by them. This formulation is meant to catch the forms of making a work available “by way of interactive on-demand transmissions” (rec. 25).

These forms of communication allow the members of the public to decide themselves, individually, where and when to access the works and cover cases where members of the public may have access to the works from different places and at different times.⁴⁶

2.3. Adaptation of copyright to the digital environment

A number of challenging legal issues are raised when it comes to deciding whether the exclusive right should apply to new uses, i.e., uses that were not an issue at the time the Directive was adopted. Interpretation is left to the courts. A lot of those uses are related to the online environment and search engines, particularly in regard to the reproduction and communication to the public of any text, images or sound recordings. Primarily, search engines do not own content, but instead organise and provide access to the vast store of material that is posted on the Internet, gaining income by selling advertising.

45 See Christophe, G. & Schönherr, F. (articles 5 and 6(4)), (in print), Stamatoudi, I. & Torremans, P. (eds.), *supra* note 35.

46 IViR Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC. See also OLG Stuttgart 21 January 2008, Az. 2 WS 328/07; 2 Ws 328/2007, *Telemedicus*, available via <http://tlmd.in/u/488> where the Criminal Court of Stuttgart clarified, on appeal, the criteria to distinguish the making available and the broadcasting of protected subject matter in a case of a service offering music streaming on demand. Via this service, users could access music (songs or albums) on demand, from a music archive with search function: they could even compose a personal radio program and listen to it whenever and from wherever they wanted. According to the Court, this service was not a broadcasting service, but an on demand service. The circumstance that users were able to choose the time of access to the recordings was decisive.

Since much of the activity carried out by search engines involves the reproduction of copyright content that has been made available on the Internet by third parties, in many cases questions of copyright infringement are likely arise. In effect, in Germany, Munich's Upper Court has found similarly in a case brought by the German newspaper Mainpost against the search engine, Newsclub, which was found to have violated the copyright protection in Mainpost's news database by searching and linking directly to it.⁴⁷

Another example of such judge-made solutions is the previously mentioned doctrine of implied licence.

In the 2003 German case *Paperboy*, the claimant publishes various newspapers and magazines in print, a selection of articles is also made freely available on the claimant's Websites.⁴⁸ The respondent operated an internet search engine ("Paperboy") for online newspaper articles free of charge. After entering a search keyword, the search engine scanned through several online versions of newspapers and other news-related Websites, all of which were freely accessible without password protection. The results of the search were delivered as a list of so-called "deep links". The Federal Court of Justice considered that each fragment in itself, when compared to the whole article, was of minor importance, so as to benefit from the protection of literary works and therefore did not constitute a relevant copy of the respective work. It reached the decision that hyperlinks consisted of the internet address, just leading where the articles resided and that they did not contain any part of the articles at all. Moreover, the Court ruled that the respondent could not be held liable for potential subsequent copyright infringements by the users of the service as it only facilitated access to the articles which were already - without any technical measures of protection - accessible to the public. For essentially the same reasons, the Court ruled that the setting of deep links without permission of the author did not constitute communication to the public and therefore did not infringe copyright, where the author had not taken any technical measures to prevent access by search engines, and had put them instead on the respective Websites and was the sole to decide for how long they remained there. While rejecting the applicability of any of the limitations invoked, the German Court thus allowed the use

⁴⁷ See also Garrote (2002), *supra* note 13.

⁴⁸ Federal Court of Justice, Decision of 17 July 2003, No. I ZR 259/00, 'Paperboy'

of the protected material as consented to by the author, while the Paperboy service enabled users to access articles they might not have otherwise found; all in all its primary function did not go beyond that of a “footnote” or other reference in a printed document.⁴⁹

Indeed, the solution of assuming an implied license has been applied in several Member States in the context of linking. Recital 30 of the Directive states that exclusive rights “may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.” The conception of an implied licence will depend on the respective national law of every member state, since copyright contract law is not yet harmonised around Europe. It has been suggested that such national jurisprudential constructions, looking for solutions in general civil and contract law, should lead to changes at the legislative level, the idea being that uses of images such as thumbnails be covered by an exception or limitation. It has been pointed out that a balance of interests of the right holder, the user, and the general public is primordial in this context.⁵⁰

2.4. Relevant Case Law

Case law relating to linking and framing is still minimal but may provide users and Web site owners with some general guidance.

A Dutch court was seized by a journalist whose articles had been published on several Websites without his permission.⁵¹ The Website owner did not dispute that a copyright infringement had taken place but did challenge the modalities of the infringement. In more detail, he asserted that the publication on distinct Websites did not amount to

49 In *Vorschaubilder II* (29 April 2010, No. I ZR 69/08), the Federal Court extended its permissive attitude to images which had been made available online without authorisation of the right holder. In this case, no implied consent was found due to lack of preventive measures; however, the consent given by the rightholder to any third party to make the image in question available online was considered a sufficient justification for Google to use such an image as a thumbnail. For a commentary of the case see Christophe, G. & Schönherr, F. (articles 5 and 6(4)), (in print), Stamatoudi, I. & Torremans, P. (eds.), *Copyright Law In The European Union A Commentary on EU Legal Instruments*.

50 Ibid.

51 De Wolf & Partners, (2013), *supra* note 22, at 33.

distinct acts of communication (although it was not clear whether the Websites used the same underlying databases and servers). The Court deliberated that the publication of the articles on each independent Website amounted to a distinct act of communication to the public, especially since the intervention was more far reaching than merely providing a hyperlink or a deeplink to another Website.

This “making available” should be considered a separate infringement. By contrast, mere “surface links” (which lead visitors of a certain domain name immediately to another Website) did not constitute a distinct act of making available from the publication on the Website to which the link leads.

This decision could suggest that the practice of embedding content in a different environment (e.g. another Website or another media space such as a social networking space) could be seen as an additional act of making available. Nonetheless, it is not conclusive given the circumstances that the Court explicitly mentioned that the user did more than just add a hyperlink and that the common source of the Websites was not established.

In another Dutch case, it was decided that an act of communication to the public of a number of educational works was performed. The owner of a Website (a teacher), who provided hyperlinks to the servers where the works were stored.⁵² The Website owner’s role went further than the mere provision of hyperlinks, as it appeared from publishers’ tests that the Website owner had stored the works on the server and could control whether the works remained available or not. The combination of the control over the server and the publication of the hyperlinks giving access to the works constituted an infringement of the publishers’ exclusive rights.

The Court of appeal of Amsterdam considered that it was not proven that the teacher had published the textbooks on the Internet nor that he had taken special measures to allow third parties to access them. Hence, no act of communication to the public could be established. The Court of appeal did however find a wrongful act and confirmed the decision of the first court. As of date, a question on hyperlinking has been submitted to the CJEU for a preliminary ruling.⁵³

⁵²Rb Haarlem 17 August 2011, case nr 173726 / HA ZA 10-1325, accessible via <http://ie-forum.nl/index.php?//Onlosmakelijk+daaraan+verbonden+antwoorden////28941/>.

⁵³In Case C-466/12, *Svensson and Others*, one of the four Swedish Courts of Appeal addressed to the

The “European Copyright Society”, consisting of independent copyright scholars, has issued an opinion on the questions referred in the Svensson case.⁵⁴ It was defended that hyperlinking in general should not be considered an act of communication to the public. This conclusion was reached on several grounds. Firstly, it was contended that the right of communication to the public requires a transmission that is absent when only a hyperlink is provided. It is merely a location tool, but exists independently from the actual availability of the work. Secondly, the communication should address a public or a “new” public. The hyperlink does not extend the public of the works, published online: those who had access to the Web page will still have access, those who did not have access (e.g. absent the payment of a fee) will not gain access through the hyperlink.

Another preliminary question was submitted by the Swedish Supreme Court in the case opposing C More Entertainment AB to Linus Sandberg. On his Website, Mr Sandberg had linked to a Website where C More Entertainment Webcasted hockey matches (this Website could not be found on the Web and was protected by a paywall). The question was asked whether the defendant performed an act of communication to the public by linking to C More Entertainment’s Website.⁵⁵

CJEU the following questions:

1. If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his Website, does that constitute communication to the public?
2. Is the assessment under question 1 affected if the work to which the link refers is on a Website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
3. When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another Website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same Website?
4. Is it possible for a Member State to give wider protection to authors' exclusive right by enabling 'communication to the public' to cover a greater range of acts than provided for in Article 3(1) of the Information Society Directive?

⁵⁴EUROPEAN COPYRIGHT SOCIETY, (15 February 2013), Opinion on the reference to the CJEU in case C-466/12 Svensson, available at

http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf

⁵⁵Request for a preliminary ruling from the Högsta domstolen (Sweden) lodged on 22 May 2013, Case

2.5. Contributory Infringement for the link provider

Direct copyright infringement occurs whenever an unauthorized "copy" of copyrighted material is made. Hypertext linking is generally not considered to come under the 'making available' right nor under the 'communication' right.⁵⁶ By incorporating a hyperlink into a Web page, the link provider directs the user's browser software to the address of another document on the Web. The party providing the link should not be subject to direct copyright infringement liability because it does not itself copy or modify the copyrighted material contained in the linked document. Instead, it is the user who makes the copy by downloading the contents of the Web page to his or her computer screen. It may, however, constitute, for the link provider -and in case this link facilitates the infringement of copyright or related rights- a contribution to an infringement.

Clearly, the link provider is no doubt helping the user make that copy. In order to hold the link provider liable for contributory infringement, it is necessary to first identify the user who makes the copy liable for direct infringement, which more often than not, is highly unlikely to happen.⁵⁷

2.6. Conclusive note on the Information Society Directive

While the starting point of this exclusive right is undisputed, it is not clear how far the making available right extends and, more particularly, whether the transmission following the availability is part of the restricted act. Some consider that this right covers "the whole act of communication, including the upload and the entire

C-279/13, C More Entertainment AB v Linus Sandberg.

⁵⁶ See *Verlagsgruppe Handelsblatt GmbH v. Paperboy*, Bundesgerichtshof No 1 ZR 259/00, 17 July 2003, [2005] E.C.D.R. 7.

⁵⁷ Under U.S. law (Section 107 of the Copyright Act) the doctrine of fair use protects the user who downloads a copy of a Web page into his or her computer. Four factors a court should consider in order to determine fair use: (i) the purpose of the use, e.g. commercial or non for profit; (ii) the nature of the copyrighted work; (iii) the amount of the copyrighted work that has been used; and (iv) the effect of the use on the market for or value of the copyrighted work. See Freeling, K. & Levi, J., (May, 1997), *Frame Liability Clouds the Internet's Future, Lawsuit Protests Web Programming Trick*, *The New York Law Journal*.

transmission to the download”. Others have doubts.⁵⁸ The legal provisions do not specify that the making available right extends to the transmission of the work. Furthermore, it is often stated that the making available per se is protected, regardless of whether the work is actually accessed and therefore transmitted. It is likely that the transmission alone is not protected or that it may be protected as a distinct act of communication.

58 Schlesinger, M., (2009), Strowel, Alain (ed.), *Peer-To-Peer File Sharing and Secondary Liability in Copyright Law*, EE.

CHAPTER III

FUTURE OF LINKS IN COPYRIGHT LAW

1. Technological measures to prevent linking

Web site owners may take various protective steps to help ward off potential legal issues, protect their information and control access.⁵⁹ As the demand for protecting intellectual properties on the Web increases, technology develops to improve protection of intellectual property. Many of these recommendations can be carried out at very little cost to the Web site owner.⁶⁰

1.1. Common Disclaimer

Web site owner's may choose to insert a general disclaimer which states that information is being linked or framed and that no relationship, affiliation, association or sponsorship is implied from the encapsulation or linking of material.⁶¹ The goal of these common disclaimers is to alleviate user confusion regarding the source of the viewed material.

1.2. No Linking or Framing or Requirement Statement

Many Web sites have statements that either expressly disallow linking to their site or have special requirements for linking.⁶²

⁵⁹ Σερενίδης, Δημήτριος, (2010), *Προσβολές της πνευματικής ιδιοκτησίας στα ψηφιακά δίκτυα*, Νομική Βιβλιοθήκη.

⁶⁰ For more details see Gort, Elaine, (Fall, 1998), *Linking and Framing, When Being Close is Too Close, Cyberspace Law*

⁶¹ Σταματούδη, Ειρήνη (επιστημονική επιμέλεια), (2009), *Δημοσιογράφοι και εκδότες ΜΜΕ-Ζητήματα Πνευματικής Ιδιοκτησίας*, Σινανίδου, Μαρία, *Ατυπες εκδοτικές «συνεργασίες»: linking, framing, metatagging*, σελ.214, Εκδόσεις Σάκκουλα, Αθήνα-Θεσσαλονίκη.

⁶² For example, Disney Web site has special policy about linking. You can view Web site policy at <http://disney.com>.

1.3. Link Removal Request Policy

Web site owners may consider including a statement saying that any link will be removed upon the owner's request. What is important is that owners of Web sites with this policy remove the links immediately after the removal requests are made.

1.4. Identify Sites Framed

Web site owners should be cautious to make it obvious that outside sites are being linked. This can be achieved by a simple statement saying the Web site provides a link to other sites maintained by third-parties.

Whenever possible the framed site should be identified. A framed site should be shown in a way as close as possible to the way the owner initially created it. Identification and lack of alteration will reduce liability relating to trademark dilution, misappropriation and unfair trade practices. Including statements similar to this effect is highly recommended: Even though the owner's Web site URL may be displayed as the current URL when framing third-party Web sites, users are actually directly accessing the third-party Web sites. The URL of the site may be seen in the lower left-hand corner of the screen by placing the mouse cursor over the link.

A statement should be included indicating that the owner's Web site does not modify, copy, or reproduce, information on third-party Web sites, and that all data is sent directly from the corresponding Web site to the user's browser without any intervention. Web site owners, when framing other Web sites, should design the framing system to only link to home pages of others, instead of internal pages, unless prior approval is obtained.

Web site owners that carry out framing of other Web sites should include an easily identifiable procedure to allow users to view the framed Web sites without the frame.

1.5. Obtain Licenses or Agreements to Link, Use Trademarks or Copyrighted Material

Web site owners should seek agreements or licenses for using trademarks in meta-tags, links or framed sites. Agreements or licenses for copyrighted material should also be sought. Web linking agreement technology could be used to identify special links that

indicate an association or license agreement has been granted or exists between the linked or framed sites. A statement should be included in the Web site's disclaimer stating that all trademarks and copyrights are owned and controlled by the third-party Web sites accessed unless otherwise stated.

1.6. Block Requests from other than Specified URLs

Software can be used to block requests or links from other than specified URLs. For example, the software can be set up so that it allows access from all the major search engines, but linking attempts from all other non-specified URL's would result in the "file not found" message.⁶³

1.7. Password Access

Web site owners may control use of their site by requiring a password.⁶⁴ Implementation of password access increases the difficulty of other Web sites accessing internal Web pages;-not only that - but also it provides the Web site owner greater control over who accesses the site and how the site is accessed.⁶⁵ An example is Facebook, which utilizes password access to prevent other sites from using their stock market data searching.⁶⁶

1.8. Track Which Web Sites are Linking to the Web Site

Web site owners may track via tracking methods how a Web site is being accessed and which Web sites are linking to them. Accordingly, tracking may be used to determine which Web sites are linking their users to or framing the owner's Web site. Immediate requests for removal or a license agreement to link to these Websites may reduce damages and help prevent litigation procedures.

1.9. Dynamic URLs

Web site owners may vary the Uniform Resource Locators (URLs) for their internal Web pages from time to time, while keeping their main pages constant. This practice

63 There are several types of blocking code that the linked-to site can incorporate into its HTML that fail to recognize the linking site. *See* Maureen A. O'Rourke, (1998), *Fencing Cyberspace.: Drawing Borders in a Virtual World*, 82 Minn. L. Rev. 609.

64 The use of passwords or other protective technological fences provide Web site owners with possible causes of action based on torts when users brake through the technological protection.

65 By prompting the end user for a password circumvents the link. *See* Ibidat 646.

66 For an example of the required password access entrance see <https://www.facebook.com/>

greatly increases the difficulty for other Web sites to link to internal pages because their URL addresses are continually changing. Web site owners may use this strategy to control access and allow framing only of the pages of their choice. These stable pages may be used for advertising and identification purposes and function as a front page for sites wishing to frame the material.⁶⁷

1.10. Software to Prevent Copying of Images

Software is available to prevent copying of text and images. This software protects images by making them much more difficult to copy or link to. When the viewer clicks on the right mouse button, which is the button generally used to copy the text or image, no menu appears.

Other technological remedies to halt unwanted links are dynamic paging, a complex structure in which the reference point of the Web pages changes, depriving the linking site of a fixed point to which to link,⁶⁸ and dissolving the link with code, where the linked-to site can use technology that dissolves the frame after a certain amount of time elapses.⁶⁹ Web site owners also have the ability to protect their intellectual property through contractual terms. More particularly, they may include conspicuous contractual terms within the Web site limiting the ability of others to link or frame the Web site. Users which violate these conspicuous terms will be liable for a breach of contract.

Although these remedies, like every technological solution, are not fully reliable, Web site owners who wish to protect their content can use technology to discourage undesirable linking without prior consent.

Some commentators renounce the technological solutions for several reasons.⁷⁰ Firstly, technological remedies soon become obsolete. Moreover, regardless of the existence of technological remedies, copyright law should be able to protect copyrightable expression, no matter the medium. Copyright law is intended to provide authors with an incentive to create works that benefit the public. Unwanted links lessen the value of

⁶⁷By periodically changing the URL of the Web site, the link is rendered ineffective. See O'Rourke, *supra* note 22, at p.645.

⁶⁸Ibid.

⁶⁹ Ibid.at 646-47

⁷⁰ See Roarty, Allison, (1999), *supra* note 11 at 1057.

online content. Lack of protection for online works discourages authors' incentive and may result in fewer online works that benefit the public.

Conclusions

Ultimately one of the aims of copyright law is to find a workable balance between the right to own and exploit information in the form of creative expression and the ability of users to access and reuse informational resources especially in a knowledge economy.

The development of the World Wide Web has been so rapid, that still few of the legal issues outlined above have made their way to court. In some instances, internet links may create liability. Despite, the “free linking” desire of the founders and first users of the World Wide Web, linking may violate law, particularly when used to disorient the viewer or to put forward illegal conduct.

Most linking to content willingly placed on the internet, is fair and lawful, even in those increasingly familiar situations where the linked site claims the right to authorize and control links.

The formulation of the rule should be that there is an outsetpresumption that is possible to provide and use normal links to Web sites. Still, the copyright owner of the Web site can clearly indicate that the link is unwelcomed for that site, and in this case his or her will should be respected. In addition, it is necessary to notify the owner of the linked Web site that a link is being provided. Naturally, moral rights of the copyright owner should always be respected, and remedies are available if a normal link violates them. In any case, if copyright law does not suffice to protect the rights of the Website owner, competition and trademark law may be invoked.

Linking, as a vital element of the World Wide Web, if disallowed or made illegal in the abstract, may result in the total disappearance of the Web. Clearly, no court or legislature will ever go so far as to outlaw all linking. Conclusively, as the World Wide Web grows further as a means of communication and commerce, the issue inherent in link liability will lead to a wide variety of novel litigation and legislation in the coming years, so much that, Internet pioneers will be surprised to find the powers of our judiciary reaching into cyberspace.

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